No. 03-1404

Supreme Court, U.S.
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In The Supreme Court of the United States

GARY L. BASS, in his official capacity as Chief of Operations of Offender Management Services for the Virginia Department of Corrections, LEWIS B. CEI, in his official capacity as Special Programs Manager for the Virginia Department of Corrections, and DUNCAN M. MILLS, in his official capacity as Central Classification Supervisor for the Virginia Department of Corrections,

Petitioners,

v.

IRA W. MADISON and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF OF PETITIONERS

This petition seeks certiorari on three questions related to the Prison Provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). On the first and primary question – whether the Prison Provisions of RLUIPA violate the Establishment Clause – both of the respondents agree that the issue is worthy of certiorari and that the petition should be granted. *See* Brief of the United States at 2; Brief of Ira Madison at 11. On the two remaining questions, the respondents oppose a grant of certiorari; however, their reasons for doing so are not persuasive. Although the respondents correctly note that the Fourth Circuit did not pass upon the Article I questions on which the petition seeks certiorari, they do not take issue with the fact that the petitioners pressed these questions below. Of course, "[a]ny issue 'pressed or passed upon below' by a federal court . . . is subject to this Court's broad discretion over the questions it chooses to take on certiorari . . . ." *Verizon Communs. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)).

I. Certiorari Should Also Be Granted on the Second Question

The second question presented by the petition asks whether Congress has the constitutional authority to enact the Prison Provisions of RLUIPA under the Spending Clause, the Commerce Clause, or any other grant of authority. In other words, even before reaching the prohibitions of the Establishment Clause, does Article I of the Constitution affirmatively assign to Congress any power that may be properly invoked to enact the Prison Provisions? This question, too, calls for this Court's attention.

A. In opposing certiorari on the second question, the United States and Madison accurately note that, unlike the Establishment Clause issue, the Article I issues are not the subject of a split in the circuits. They are, however, issues that sooner or later must be resolved by this Court, and there are significant jurisprudential risks posed by resolving them in the piecemeal fashion suggested by respondents. For example, if the Court hears the Article I issue along with the Establishment Clause issue, then the Prison Provisions will be struck down if a majority of this Court concludes they are unconstitutional *even though* there may be no majority on the *reason* for that result. Three or four Justices may see a problem under the Establishment Clause but not under Article I. At the same time, three or four different Justices may see a problem under Article I, but not under the Establishment Clause. Despite the differing grounds for their views, a majority would concur that the Prison Provisions are unconstitutional and they would be struck down.

On the other hand, if the Establishment Clause and Article I issues are considered *seriatim*, in different cases, separated perhaps by a space of years, the *same* split of opinion among the Justices would produce the *opposite* result. Although a majority of Justices would view the Prison Provisions as unconstitutional, the statute would survive judicial review. Sustained on each issue by a different majority, the Prison Provisions would escape constitutional restraint by the technical happenstance of having been subjected to scrutiny in two cases rather than one. Constitutional consequences should not turn on details of process as gossamer as this.

B. The possibility of such a judicial conundrum would be less worrisome if there were no credible basis for

believing that Congress exceeded its Article I powers when it enacted the statute at issue. However, neither respondent has seriously suggested that the Commerce Clause empowers Congress to enact the Prison Provisions. Brief of the United States at 11-13; Brief of Madison at 9. Moreover, the two circuits that have sustained the Prison Provisions under the Spending Clause have done so with a rationale that is transparently flawed. As pointed out in the petition, both the Seventh and Ninth Circuits have misread *South Dakota v. Dole*, 483 U.S. 203 (1987). Both circuits have conflated the *Dole* requirement that a federal funding condition be related to the general welfare and the requirement that a funding condition be related to the federal interest in the program at issue. Pet. at 21, n.19. *See also Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275, 295 (1958) ("The Federal Government may establish and impose reasonable conditions relevant to federal interest in *the project* and to the over-all objectives thereof") (emphasis added). In short, the Spending Clause rationale used by the Seventh and Ninth Circuits is plainly invalid, and neither respondent has suggested otherwise.

C. Instead of defending the Spending Clause rationale used by the Seventh and Ninth Circuits, Madison asserts that the Prison Provisions comply with what he terms the "minimal relatedness test" required by *Dole.* Brief of Madison at 9. According to Madison, "[a] principal purpose of federal prison funding is the rehabilitation of inmates, to which religion may reasonably be deemed conducive." *Id.* Yet, the relatedness test found in *Dole* is not so "minimal" as Madison suggests; and many of the prison gangs that act in the name of religion – and routinely invoke the provisions of RLUIPA – are active

obstacles to rehabilitation. *See* Pet. at 5 (citing examples). Yet, leaving these points aside, Madison gives no basis for his sweeping suggestion that "rehabilitation" is the principal purpose for all federal prison funding programs.

For *some* programs, rehabilitation of inmates may very well be the principal objective. However, for *other* programs, the goal is safety and security – for the public at large, for prison personnel and, in some cases, for the inmates. Yet, *whatever* the purpose of the program, RLUIPA demands compliance with the stringent requirements of the Prison Provisions as a condition for receiving the federal funds. *Dole* does not permit such a result.

D. The distinction between spending programs aimed at rehabilitation and spending programs aimed at safety and security is further illustrated by a review of some of the federal programs by which States may obtain money for their prisons. Examples of programs aimed at safety and security are the "grants to protect inmates and safeguard communities" available pursuant to 42 U.S.C. § 15605 (2004) to prevent and prosecute prison rape and funding available pursuant to the Violent Crime Control and Law Enforcement Act of 1994 to increase capacity to confine violent offenders. It is difficult to imagine how the demands of RLUIPA are related – even minimally – to the goals of prosecuting prison rapists, or ensuring sufficient space in correctional facilities to confine violent offenders.

E. Unlike Madison, the United States does not make the untenable suggestion that all prison funding programs have rehabilitation as their principal purpose. Instead, the United States suggests that certiorari should not be granted on the Spending Clause question because "the lower courts have not yet been afforded the opportunity to

consider the question in light of this Court's recent decision" in *Sabri v. United States*, 124 S. Ct. 1941 (2004). United States Brief at 13. *Sabri*, however, is simply not relevant to the case at hand.

While *Sabri* dealt with the Spending Clause, it did so in the context of an individual who offered bribes to a city councilman in Minneapolis, a city receiving more than $10,000 in federal funds. The question was whether 18 U.S.C. § 666(a)(2) was unconstitutional on its face for failure to require proof of a connection between the federal funds received by the local government and the alleged bribe of the local official. Thus, the issue in *Sabri* was in no way related to Congress' power to influence State policy choices by imposing funding conditions on the States, which was the question at issue in *Dole* and which arises again in connection with RLUIPA. Indeed, the criminal defendant in *Sabri* asked this Court to draw a connection between his case and the principles set forth in *Dole*; but the Court expressly declined to do so. As the Court explained:

> Sabri next argues that § 666(a)(2) amounts to an unduly coercive, and impermissibly sweeping, condition on the grant of federal funds as judged under the criterion applied in *South Dakota v. Dole*. This is not so. Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, *not a means for bringing federal economic might to bear on a State's own choices of public policy*.

Sabri, 124 S. Ct. at 1947-48 (emphasis added) (citation omitted). In short, *Sabri* throws no light on the issue at hand, a fact that discussion of *Sabri* in the lower courts will not change.

II. Certiorari Should Also Be Granted on the Third Question

The third question presented by the petition assumes that the Prison Provisions are constitutional and asks if the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), is applicable. This Court, in both *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), has created exceptions to the *Ex Parte Young* doctrine, but it has never articulated the precise contours of those exceptions. This petition gives the Court an opportunity to do so and respondents have said nothing to suggest otherwise.

A. As the petition notes, Congress has enacted a "detailed remedial scheme," *Seminole Tribe*, 517 U.S. at 74-75, in that the National Government may withdraw federal funds if the recipient of a corrections grant violates the Prison Provisions. Pet. at 28. Additionally, as the United States points out, the National Government "may seek injunctive or declaratory relief to enforce [the Prison Provisions]." United States Brief at 4. For both of these reasons, there is a "detailed remedial scheme" which ought to preclude the application of the *Ex Parte Young* doctrine.

B. Moreover, while the United States opposes certiorari on the third question, it does not deny that "special sovereignty interests" are present. Indeed, Virginia's sovereign interest in determining the terms and conditions of punishment for those that violate its laws is at least as important as Idaho's interest in the ownership of land beneath its rivers and streams.

CONCLUSION

For the reasons set forth above and in the petition, certiorari should be granted on all three questions presented.

Respectfully submitted,

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